108-162

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 183.

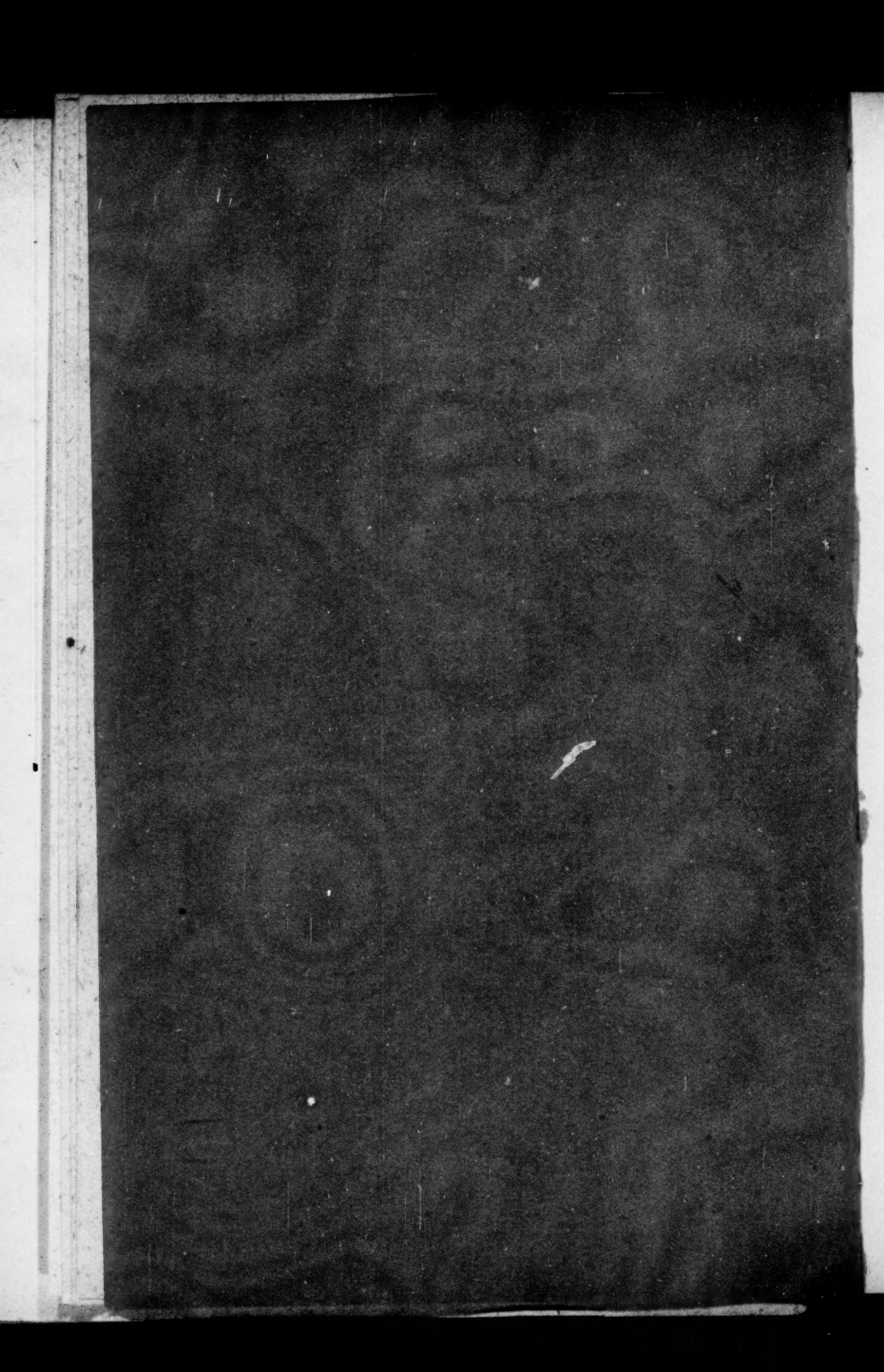
LEVI GOLDENBERG, REUBEN GOLDENBERG, SIMON GOLDENBERG, AND ANSEL WEINBERG, PLAINTIFFS IN ERROR,

vs.

THOMAS MURPHY, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 10, 1880.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Levi Goldenberg, Reuben Goldenberg, Simon Goldenberg, and Ansel Weinberg, plaintiffs, and Thomas Murphy, defendant, a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appear', we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October, eighteen hundred and eighty, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24th day of December, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed. Dated New York, December 24th, 1879.

SAM'L BLATCHFORD,
Circuit Judge.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-eight, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Levi Goldenberg, Reuben Goldenberg, Simon Goldenberg, and Ansel Weinberg, plaintiffs in error, against Thomas Murphy, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fifteenth day of January, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the said United States the one hundred and fourth.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) U. S. Supreme Court. Levi Goldenberg et al., plaintiffs in error, against Thomas Murphy, defendant in error. Writ of error.

Stanley, Brown & Clarke, att'ys for pl'ffs in error, 195 B'way. Filed Dec. 29, 1879.

Due service of a copy of the within writ of error is hereby admitted. N. Y., Dec. 29, 1879.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

3 *Summons for a money demand on contract.*

Superior court of the city of New York.

LEVI GOLDENBERG, REUBEN GOLDENBERG, SIMON Goldenberg, and Ansel Weinburg, plaintiffs,
against
THOMAS MURPHY, DEFENDANT.
} Com. not ser.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the superior court of the city of New York at the new court-house in said city, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 59 Liberty street, in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of fifteen hundred dollars, in gold, with interest from the 12th day of September, one
4 thousand eight hundred and seventy-one, besides the costs and disbursements of this action.

Dated Aug. 21, 1872.

ISAAC PHILLIPS,
Plaintiffs' Attorney.

(Endorsed:) 1918. N. Y. superior court. Levi Goldenberg & others ag'st Thomas Murphy. Summons. Custom-house, New York. Received Aug. 27, 1872. Isaac Phillips, pl'ffs' att'y, 59 Liberty st., N. Y. Sept. 7, '72. To Thos. Murphy, esq. Rec'd Aug. 27, 1872.

5 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause, commenced before you against Thomas Murphy, defendant, by Levi Goldenberg & al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court at the city of New York, on the 27th day of November, 1872, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Salmon P. Chase, esquire, Chief Justice of the Supreme Court of the United States, the 13th day of November, 1872.

[L. S.] KENNETH G. WHITE, *Clerk.*

NOAH DAVIS,
Defendant's Attorney.

6 (Indorsed:) 1918. U. S. circuit court. T. Murphy ads. L. Goldenberg & al. Copy. Certiorari. Noah Davis, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, Nov. 13, 1872.

Yours,

NOAH DAVIS,
Defendant's Attorney.

To , plaintiffs' attorney.

Due service of a copy of the within and of the above notice is hereby admitted.

New York, Nov. 13, 1872.

ISAAC PHILLIPS,
Plaintiffs' Attorney.

7 Superior court of the city of New York.

LEVI GOLDENBERG & OTHERS
against
THOMAS MURPHY.

NEW YORK, *Oct.* 2, 1872.

SIR: Please take notice that the following, or within, is a bill of particulars of the plaintiffs' demand in this action, which is brought to recover money erroneously and illegally exacted of and from the plaintiff by the defendant as collector of customs at the port of New York, as and for duties on merchandise imported in the vessels and at the dates specified in said bill of particulars.

Yours, &c.,

ISAAC PHILLIPS,
Plaintiffs' Attorney.

To NOAH DAVIS, Esq.,
Defendant's Attorney.

(Endorsed:) N. Y. superior court. Levi Goldenberg & others against Thomas Murphy. Bill of particulars. Isaac Phillips, attorney for plaintiffs. Oct. 2, '72.

8 *Bill of particulars.*

Name of importer.	Description of merchandise.	Place whence imported.	Name of vessel.	Date of invoice.
Levi Goldenberg, Reuben Goldenberg, Simon Goldenberg, & Ansel Weinberg, composing the firm of Goldenberg Brothers & Company.	Thread lace	Liverpool	City of Brussels	Aug. 28, 1871
		do	Cimbria	May 4, 1871
		do	Java	May 6, 1871
		do	City of New York.	June 9, 1871
		Bremen	Westphalia	July 2, 1871

Date of entry at custom-house.	Amount of excess claimed.	Date of payment.	Date of filing protest.	Date of appeal to Sec'y of Treasury.	Date of decision of appeal.
Sept. 12, 1871..	$92 10	Sept. 12, 1871.	Sept. 21, 1871.	Sept. 27, 1871.	May 28, 1872.
May 22, 1871..	130 80	May 22, 1871.	June 30, 1871.	.....do	No decison.
June 7, 1871..	81 30	June 8, 1871.	July 6, 1871.	.....do	Do.
June 29, 1871..	554 10	June 29, 1871.	July 31, 1871.	.....do	Do.
July 29, 1871..	282 30	July 29, 1871.	Sept. 21, 1871.	.....do	Do.

9 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable Nathaniel Shipman, circuit judge.

LEVI GOLDENBERG ET AL.
vs.
THOMAS MURPHY. } 1913.

On motion of S. G. Clark, esq'r, of counsel for the plaintiffs in the above-entitled case, ordered trial.

Jurors sworn: John F. Scott, Andrew Campbell, Horace K. Thurber, Benjamin Haxtum, Hollis L. Powers, Horace Durrie, James L. McKeever, Geo. G. Nason, Geo. T. M. Davis, Geo. C. Magoun, William F. Carey, jr., William H. Daggett.

Mr. Clarke opens the case on the part of the plaintiffs.

Evidence for the plaintiffs: Plaintiffs' entries, invoices, protests, and appeals.

10 Affidavit of Joseph T. Brennan read.

Mr. Clarke moves that the court direct the jury to find a verdict for the plaintiffs, and is heard in support of said motion.

J. Dana Jones, esq'r, ass't U. S. attorney, of counsel for the defendant, is heard in opposition.

Mr. Clarke is heard in reply.

11 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy-nine.

Present, the honorable Nathaniel Shipman, circuit judge.

LEVI GOLDENBERG ET AL.
vs.
THOMAS MURPHY. } 1913.

This case being still on trial, the jurors sworn in it are called and severally answer to their names.

Counsel for the respective parties herein consenting—

Ordered, that the said jurors be, and they are hereby, discharged from the further consideration of this case until such time as they shall be called together again by the court.

NOVEMBER 6, 1879.

The jury having been recalled, the court directs a verdict for the defendant.

The jury thereupon say that, by direction of the court, they find a verdict for the defendant, and so say they all.

12 Immediately after the direction of the court to the jury to find a verdict for the defendant, Mr. Clarke excepts to the ruling of the court in directing the jury to find a verdict for the defendant.

On motion of Mr. Clarke, ordered that the plaintiffs have thirty days in which to make & prepare a bill of exceptions.

13 *Judgment.*

United States circuit court, southern district of New York.

LEVI GOLDENBERG, REUBEN GOLDENBERG, Simon Goldenberg, & Ansel Weinberg
vs.
THOMAS MURPHY.

The issues in this action having been brought on for trial before Mr. Judge Shipman and a jury, at a circuit court of the October term, 1879, and the issues having been tried, and a verdict for the defendant, by direction of the court, having been duly rendered on the twenty-eighth day of October, 1879, and his costs having been adjusted at $48.91—

Now, on motion of Stewart L. Woodford, United States attorney, for defendant,

It is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $48.91, his taxed costs, and have execution therefor.

Judgment signed this 10th day of Dec., 1879.

J. M. DEUEL,
Dep'ty Clerk.

14 (Indorsed:) 736. 1913. (8456.) United States circuit court. Levi Goldenberg & al. vs. Thomas Murphy. Judgment roll. Stewart L. Woodford, United States attorney, for defendant. Filed , 187 . Costs, $48.91. U. S. circuit court. Filed Dec. 10, 1879. John I. Davenport, clerk.

15 Circuit court of the United States for the southern district of New York. In the second circuit.

LEVI GOLDENBERG, REUBEN GOLDENBERG, Simon Goldenberg, and Ansel Weinberg
against
THOMAS MURPHY.
Engrossed bill of exceptions.

Afterwards, to wit, on the 24th day of October, 1879, at a stated term of this court, begun and holden at the city of New York, to wit, on the third Monday of October, 1879, before the honorable Nathaniel Shipman, district judge of the United States for the State of Connecticut, appointed

to hold the said circuit court, according to the form of the statute in such case made and provided, the aforesaid issue so joined as between the said parties as aforesaid, as by the record more fully appears, came on to be tried by a jury duly empanelled and sworn for that purpose, the said plaintiffs being represented by Mr. Stephen G. Clarke, & the said
16 defendant by Mr. J. Dana Jones.

And in the course of the trial the said counsel for the plaintiffs did take and allege sundry exceptions to the rulings and charge of the court, and to the refusal of the court to give certain instructions to the jury as then and there prayed for by them, which said exceptions are hereinafter severally set forth.

To maintain the said issues on the part of the plaintiffs, counsel for the plaintiffs offered in evidence an entry by the City of Brussels, dated Sept. 12, 1871, together with the accompanying invoice. Also protest against the assessment of more than 30 per cent. duty upon certain thread lace covered by said entry, duty thereon having been assessed and paid at the rate of 60 per cent.

It was thereupon conceded by counsel for defendant that the importation protested against consisted of thread lace, dutiable under the decision of the Supreme Court at thirty per cent. ad valorem, and not at 60 per cent. as assessed by the defendant.

17 It further appeared that plaintiffs by an appeal, dated Sept. 27, 1871, duly appealed to the Secretary of the Treasury from the decision of the collector aforesaid; upon which appeal the Secretary of the Treasury rendered his decision as follows:

TREASURY DEPARTMENT,
Washington, D. C., May 28, 1872.

SIR: Your action in the assessment of duty at the rate of 60 per cent. ad valorem on certain so-called thread lace, embraced in the following named entries, from which appeals have been made to this Department by the several importers, is hereby affirmed, that is to say:

Entry per Rhein, Aug. 26, 1871. Duden, Freres & Co., appeal No. 2028, dated Sept. 28, 1871.

Entry per Oceanic, Aug. 21, 1871. Duden, Freres & Co., appeal No. 2028, dated Sept. 28, 1871.

Entry per Russia, Aug. 23, 1871. Duden, Freres & Co., appeal No. 2028, dated Sept. 28, 1871.

Entry per Scotia, Sept. 5, 1871. Duden, Freres & Co., appeal No.
18 2028, dated Sept. 28, 1871.

Entry per Atlantic, Sept. 7, 1871. Duden, Freres & Co., appeal No. 2028, dated Sept. 28, 1871.

Entry per City of Brussels, Sept. 12, 1871. Goldenberg, Bros. & Co., appeal No. 2013, dated Sept. 27, 1871.

Entry per Hamonia, July 20, 1871. Arnold, Constable & Co., appeal No. 2267, dated Oct. 20, 1871.

Entry The Queen, Aug. 12. Arnold, Constable & Co., appeal 2267, dated Oct. 20, 1871.

Entry Algeria, Aug. 15. Arnold, Constable & Co., appeal 2267, dated Oct. 20, 1871.

Entry per Oceanic, Aug. 15. 1871, Arnold, Constable & Co., appeal 2267, dated Oct. 20, 1871.

Entry per Westphalia, Sept. 6, 1871 Arnold, Constable & Co., appeal 2267, dated Oct. 20, 1871.

Entry per Batavia, Sept. 5, 1871. Arnold, Constable & Co., appeal No. 2267, dated Oct. 20, 1871.

Entry per Cuba, Sept. 7, 1861. Arnold, Constable & Co., appeal 2267, dated Oct. 20, 1871.

Entry per Algeria, Sept. 18, 1871. Arnold, Constable & Co., appeal 2267, dated Oct. 20, 1871.

Entry per Russia, July 20, 1871. Arnold, Constable & Co., appeal 2267, dated Oct. 20, 1871.

Entry per Algeria, June 5, 1871. Duden, Freres & Co., appeal 1287, dated July 24, 1871.

I am very respectfully,

GEO. S. BOUTWELL,
Secretary.

To C. A. ARTHUR,
Collector, New York.

And also notified plaintiffs of his decision by a letter in writing, which is as follows:

TREASURY DEPARTMENT,
Washington, D. C., May 28, 1872.

GENTLEMEN: You are hereby referred to the collector at New York for the Department's decision, of this date, in so much of your appeal (2613 A) of September 27th last, from his assessment of duty at the rate of sixty per cent. ad valorem on certain so-called thread lace, imported by you as is entertained, viz: so far as it relates to your entry per City of Brussels, September 12, 1871.

I am, very respectfully,

J. F. HARTLEY,
Assistant Secretary.

To Messrs. GOLDENBERG, BROS. & Co.,
(*Per Hunt & Phillips, att'ys, New York.*)

It was agreed that the two letters above given were not received by the collector or by the plaintiffs until May 29th, 1872.

The plaintiffs' bill of particulars, in respect to the claim in suit, was given in evidence, as follows:

Description of merchandise, thread lace.
Place whence imported, Liverpool.
Name of vessel, City of Brussels.
Date of invoice, August 28, 1871.
Date of entry at custom-house, September 12, 1871.
Amount of excess claimed, $91.10.
Date of payment, September 12, 1871.
Date of filing protest, September 21, 1871.
Date of appeal to Secretary of Treasury, September 27, 1871.
Date of decision of appeal, May 28, 1872.

21 It was also agreed that it is the custom of the Secretary of the Treasury to communicate his decision upon appeals to the collector whose decision has been appealed from, but there is no regulation which requires the Secretary so to do.

Counsel for the plaintiffs then put in evidence the summons in this action, dated August 21, 1872, and sheriff's certificate of service thereof on the defendant, on August 27th, 1872.

Superior court of the city of New York.

Summons for money demand on contract.

LEVI GOLDENBERG, REUBEN GOLDENBERG, Simon Goldenberg, and Ansel Weinberg, plaintiffs,
against
THOMAS MURPHY, DEFENDANT.
} Com. not ser'd.

To the defendant above named.

Your are hereby summoned and required to answer the complaint
22 in this action, which will be filed in the office of the clerk of the superior court of the city of New York, at the new court house in said city, and to serve a copy of your answer to the said complaint, on the subscriber, at his office No. 59 Liberty street in said city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will take judgment against you for the sum of fifteen hundred dollars in gold, with interest from the 12th day of September, one thousand eight hundred and seventy-one, besides the costs and disbursements of this action. Dated August 21, 1872.

ISAAC PHILLIPS,
Plaintiffs' Attorney.

Certificate of service of summons.

Superior Court.

LEVI GOLDENBERG
ag'st
THOMAS MURPHY.

CITY AND COUNTY OF NEW YORK, *ss:*

23 I certify that in the twenty-seventh day of August, 1872, at the city and county of New York, I served the summons, of which the annexed is the original, *and* Thomas Murphy, the defendant in this cause, by delivering said summons to, and leaving the same with, Thomas Murphy, said defendant, personally.

P. C. LYNCH,
Deputy Sheriff.

It was thereupon admitted in evidence that the defendant's residence was in the city and county of New York, and that said defendant was absent therefrom for a few days prior to August 27, 1872.

The following affidavits of Isaac Phillips, and Joseph T. Brennan were, by agreement, read in evidence.

CITY AND COUNTY OF NEW YORK, *ss:*

Isaac Phillips, of the city of New York, attorney and counsellor at law, deposeth and saith that on the 29th day of May, 1872, he received as attorney for Goldenberg, Brothers & Co. a decision from the U.
24 S. Treasury Department, dated 28th May, 1872, affirming the action of the collector at New York in assessing duties on certain laces imported by them, and that on the 21' day of August, 1872, as attorney for Levi Goldenberg and others, he issued a summons in their behalf as plaintiffs (out of the superior court of the city of New York) against Thomas Murphy (formerly collector of customs), to recover an excess of duties levied by him while collector, on the article of thread lace imported by them, requiring said Murphy to answer the complaint in the action which should be filed in the office of the clerk of the superior court aforesaid; that this deponent, on said 21st day of August, 1872, and for several days thereafter, personally made, and also caused to be made, due and diligent search after said defendant Murphy in order to serve said summons or a copy thereof upon him, but could not find said Murphy, who was no longer collector nor atached to the custom-house; that not being able to find said defendant Murphy between the 21st day of August aforesaid and the morning of the 26th day of same month
25 and year, this deponent requested James I. Thomson, counsellor at law, of this city, to deposit with the sheriff of the county of New York, for service by him on said defendant, Murphy, the summons aforesaid, and this deponent was on the same day, to wit, 26 August, 1872, informed by said Thomson that he had left said summons for service at the sheriff's office. And this deponent saith that on the following day, to wit, 27th August, 1872, P. C. Lynch, deputy sheriff, furnished him with a certificate that he had served the summons on Thomas Murphy, the defendant, on the 27th August, 1872. That Thomas Murphy, the defendant, duly appeared in the action, by his attorney, who removed it by writ of certiorari to the U. S. circuit court, and this deponent, within the time required by law, filed a bill of particulars of the plaintiffs' claim; and this deponent further states that the commencement of the suit before mentioned by service on said defendant, Murphy, of the requisite summons, was within ninety days, or before the expiration thereof, from the date of the receipt of the
26 decision of the Secretary of the Treasury, which receipt was on the 29th day of May, 1872, although said decision was dated at Washington, 28 May, 1872.

ISAAC PHILLIPS.

Sworn to this 2nd day of December, 1878.

HERMAN S. PHILLIPS,
Notary Public, N. Y. City.

Superior court of the city of New York.

LEVI GOLDENBERG AND OTHERS
against
THOMAS MURPHY.

CITY AND COUNTY OF NEW YORK, *ss:*

Joseph D. Brennan, being duly sworn, says that he resides at 105th street and the Bvulevard, in the city of New York; that he is the clerk of his father, Matthew T. Brennan, and has charge of his business and his books of the office of sheriff of the said county, kept during the term of said Matthew T. Brennan's office, to wit, from Jan'ry 1st, 1871, to Dec. 11, 1873; that, as appears from the entry upon the books kept in the
27 said sheriff's office during said term, the summons annexed hereto was received by said sheriff, for service on the defendant, on the twenty-sixth day of August, 1872, and was served on the defendant on the 27th day of August, 1872.

JOSEPH D. BRENNAN.

Sworn to before me this 11th day of Dec., 1878.

ANDREW GILHOOLY,
Notary Public, N. Y. County.

The summons annexed to said affidavit is the same summons hereinbefore set forth.

It was agreed that ninety days from May 28th, 1872, expired on August 26, 1872, and that ninety days from May 29, 1872, expired on August 27, 1872.

Both parties having thereupon rested, the plaintiffs' counsel requested the court to direct a verdict in favor of the plaintiffs, which the court refused to do, and counsel for plaintiffs thereupon duly excepted.
28 Counsel for defendant thereupon requested the court to direct a verdict in favor of the defendant, and the court thereupon directed a verdict in favor of the defendant, and counsel for plaintiffs duly excepted thereto.

And because none of the said exceptions so offered and made to the opinion, instructions, and decisions of the court do appear upon the records of the said trial, therefore, on the prayer of the said plaintiffs, by their counsel, the said judge has to this bill of exceptions put his seal nunc pro tunc as of the 12th day of November, 1879.

N. SHIPMAN, *Judge.* [L. S.]

29 (Indorsed:) U. S. circuit court, southern dist. of New York. Levi Goldenberg et al., plaintiffs, against Thomas Murphy, defendant. Engrossed bill of exceptions. Isaac Phillips, attorney for plaintiffs, New York. Filed Nov. 21, 1878.

30 *Assignment of errors.*

Supreme Court of the United States.

LEVI GOLDENBERG, REUBEN GOLDENBERG, Simon Goldenberg, & Ansel Weinberg
against
THOMAS MURPHY.

Of October term, in the year of our Lord one thousand eight hundred and eighty.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Levi Goldenberg, Reuben Goldenberg, Simon Goldenberg, and Ansel Weinberg, by Stanly, Brown & Clarke, their attorneys, and say that in the record and
31 proceedings aforesaid there is manifest error in this, to wit, in the refusal of the court to direct a verdict for the plaintiffs in error as therein prayed for; also that there was error in the direction of the court to the jury that the defendant was entitled to a verdict, and in that judgment was given for the defendant in error against the plaintiffs in error, whereas by the law of the land judgment ought to have been given for the said plaintiffs in error against said defendant in error.

And the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment.

STANLEY, BROWN & CLARKE,
Attorneys for Pl'ffs in Error.

32 (Endorsed:) U. S. Supreme Court. Levi Goldenberg et al. vs Thomas Murphy. Assignment of errors. Stanley, Brown & Clarke, att'ys for pl'ffs in error.

Due service of a copy of the within is hereby admitted.
Dated N. Y., Dec. 31, 1879.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't.

U. S. circuit court. Filed Dec. 31, 1879. John I. Davenport, clerk.

33 Supreme court of the United States.

LEVI GOLDENBERG, REUBEN GOLDENBERG, Simon Goldenberg, and Ansel Weinberg, plaintiffs in error,
vs.
THOMAS MURPHY.
N. S. 1913.

And afterwards, to wit, on the second Monday of October, 1880, the said Thomas Murphy, defendant in error, by Stewart L. Woodford, his attorney, comes here into court and says that there is no error, either in

the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said supreme court, before the justices thereof now here, may proceed to examine well the records and proceedings aforesaid as the matters aforesaid above assigned for error, and that the
34 judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

STEWART L. WOODFORD,
Attorney for Defendant in Error.

(Endorsed:) Supreme Court of the United States. Levi Goldenberg & al., plaintiffs in error, vs. Thomas Murphy, defendant in error. N. S. 1913. Joinder in error. Stewart L. Woodford, attorney for defendant in error.

Due service of a copy of the joinder in error in the within entitled action is hereby admitted.

New York, Jan'y 3d, 1880.

STANLEY, BROWN & CLARKE,
Attorneys for Plaintiff in Error.

35 *Bond for damages and costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

LEVI GOLDENBERG ET AL.
vs.
THOMAS MURPHY.

Know all men by these presents, that we, John Horspool and Melvin Brown, are held and firmly bound unto the above-named Thomas Murphy in the sum of two hundred and fifty dollars, to be paid to the said Thomas Murphy, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the ninth day of December, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, the above named Levi Goldenberg, Simon Goldenberg, & Louis Seeberger, have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Levi Goldenberg, Simon Goldenberg, and Louis Seeberger shall prosecute said writ of error to effect, and answer all damages and costs if they shall fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN HORSPOOL. [L. S.]
MELVIN BROWN. [L. S.]

Sealed and delivered, and taken and acknowledged, this 23' day of Dec'r, 1879, before me, by John Horspool.

[L. S.] JAS. J. THOMSON,
Notary Public, N. Y. Co.

Sealed & delivered and acknowledged by Melvin Brown, this 23d day of December, 1879, before me.

S. F. RANDALL,
Notary Public, Kings Co.

36 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Melvin Brown, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

MELVIN BROWN.

Sworn to before me this December 23, 1879.

S. F. RANDALL,
Notary Public, Kings Co.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

John Horspool, being duly sworn, deposes and says that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOHN HORSPOOL.

Sworn to this 9th day of Dec'r, A. D. 1879, before me.

ANDREW GILHOOLY,
Notary Public, New York.

(Indorsed:) U. S. circuit court. Levi Goldenberg et al. vs. Thomas Murphy. Bond for damages and costs on . Proctor.

Approved Dec. 24th, 1879.

SAM'L BLATCHFORD,
Circuit Judge.

U. S. circuit court, Dec. 24, 1879. John I. Davenport, clerk.

37 UNITED STATES OF AMERICA, *ss:*

To Thomas Murphy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Levi Goldenberg, Reuben Goldenberg, Simon Goldenberg, and Ansel Weinberg are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated New York, December 24th, 1879.

SAM'L BLATCHFORD,
Circuit Judge.

38 (Indorsed:) A 262. U. S. Supreme Court. Levi Goldenberg et al., plaintiffs in error, against Thomas Murphy, defendant in error. Citation. Stanley, Brown & Clarke, att'ys for pl'ffs in error, 195 B'way, N. Y.

Due service of a copy of the within citation is hereby admttied.
Dated N. Y., Dec. 29, 1879.

STEWART L. WOODFORD,
U. S. Attorney, Att'y for Def't in Error.

U. S. circuit court. Filed Dec. 29, 1879. John I. Davenport, clerk.

(Indorsement on cover:) No. 183. Levi Goldenberg, Reuben Goldenberg, Simon Goldenberg, & Ansel Weinberg, plaintiff' in error, vs. Thomas Murphy, late collector, &c. S. New York C. C. U. S. Filed 10th February, 1880.

BURGOYNE (Law Tel. 587), 57, 59 & 61 Park St.

SUPREME COURT U.S.
JAN 26 1883
JAMES H. McKENNEY, Clerk.

108-162

In the Supreme Court.

Levi Goldenberg, Reuben Goldenberg, Simon Goldenberg, and Ansel Weinberg, Plaintiffs in Error, vs. Thomas Murphy, Collector, &c., Defendant in Error.	October Term, 1882 No. 183.

In Error to the Circuit Court for the Southern District of New York.

Brief in Behalf of Plaintiffs in Error.

Statement.

The plaintiffs are importers in the City of New York, and on the 12th September, 1871, they made entry of certain thread laces, on which the defendant, as Collector at the port of New York, assessed duty at the rate of sixty per centum ad valorem. The plaintiffs thereupon, in due time and form, protested—claiming thirty per centum to be the correct duty. It appeared, on the trial, that the plaintiffs were right in this claim (Record, fol. 16).

The plaintiffs further appealed from the decision

of the defendant, to the Secretary of the Treasury; upon which appeal the Secretary decided as follows:

"Treasury Department,
"Washington, D. C.,
"May 28, 1872.

"SIR,—Your action in the assessment of duty, at the rate of 60 per cent. ad valorem, on certain so-called thread lace, embraced in the following-named entries, from which appeals have been made to this department by the several importers, is hereby affirmed, that is to say—Entry per "Rhein, Aug. 26, 1871, Duden Freres & Co. * * * Entry per "City of Brussels," Sept. 12, 1871. Goldenberg, Bros. & Co. Appeal No. 2,013. dated Sept. 27, 1871. Entry per "Hammonia," July 20, 1871, Arnold Constable & Co. * * * &c., &c.

"I am, very respectfully,
"GEO. S. BOUTWELL, Secretary."

Record, pp. 6 & 7.

On the same day a letter was sent by the Department to the plaintiffs, stating: "You are hereby referred to the Collector at New York for the Department decision of this date," &c.

Record, fol. 19.

Neither the letter of decision to the Collector or of notice to the plaintiffs were received by the Collector or the plaintiffs until May 29th, 1872.

Record, fol. 20.

It is the custom of the Secretary of the Treasury to communicate his decision upon appeals to the Collector whose decision has been appealed from, but there is no regulation requiring this.

Record, fol. 21.

This action was commenced in the Superior Court of the City of New York. The summons was dated August 21, 1872 (Record, fol. 22); and was served on the defendant, by a Deputy Sheriff, August 27, 1872

(*Ib.*, fol. 23). It further appeared, by the testimony of Isaac Phillips, plaintiffs' attorney, that he issued said summons Aug. 21st, and that on that day and for several days thereafter, personally made, and also caused to be made, diligent search after the defendant in order to serve said summons, but could not find him. he not then being collector or attached to the Custom House; that, on August 26th he caused said summons to be left at the office of the Sheriff of New York, for service (Record, page 9).

It further appeared from the entries at the Sheriff's office, that said summons was received by the Sheriff, for service on the defendant, August 26th, 1872 (Record, fol. 27). The residence of defendant was in the City and County of New York, but for some days prior to August 27th, 1872, he was absent therefrom (Record, page 8, bottom).

Ninety days from May 28, 1872, expired August 26th, 1872; and from May 29th, on August 27th, 1872.

The Court directed a verdict for the defendant.

The Act of June 30, 1864, c. 171, in its fourteenth section (13 Stats., 215), makes the decision of the Secretary upon appeal final, "unless suit shall be brought within ninety days after the decision of the Secretary," and concludes with this provision:

"And no suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless said decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, nor more than five months in case of an entry west of those mountains."

13 U. S. Stat. at Large, chap. 171, sec. 14, p. 215.

It is under this statute that the Court below, on the theory that the decision of the Secretary was had on the day a letter was dated in his office in

Washington, viz., May 28th, and that this suit was not commenced until Aug. 27th, the date of the actual *service* of the summons, directed a verdict for the defendant.

Errors Assigned.

The Court erred in not directing a verdict for plaintiffs, as requested by them.

The Court erred in directing a verdict for the defendant.

POINTS.

I.

Under general principles this suit was commenced at the date of the issuance of the summons, viz., August 21st, and, therefore, within ninety days from the rendering of the decision.

By the law of England and of this country, the date of the commencement of the suit was the date of the issuance of the writ.

Morris vs. Harwood, 3 Burrows, 1241, 1243.
Foster vs. Bonner, Cowp., 456.
Wood vs. Newton, 1 Wils., 147.
And see note to 2 Saunders, pp. 12, 13.

In the case of Society, &c., vs. Whitcomb, 2 N. H., 227, decided in 1820, Judge Woodbury, delivering the opinion of the Court in an exhaustive review of all the cases, concludes that the actual date of the suing out of process is the time of the commencement of the action; and stops the running of Statutes of Limitation.

So in Bird vs. Caritat, 2 Johns, 342, 346. Kent, Ch. J., said, "The time of suing out the writ is the

commencement of the suit, * * * This is the good sense as well as the truth of the subject."

See also Garland vs. Chattle, 12 Johns., 430; under the New York Code the issuing of summons by the attorney is the equivalent of the common law writ.

Civil actions in the courts of record of this State shall be commenced by the service of a summons.

Code, § 127.

An exception applicable to this case will be noted hereafter.

The summons shall be subscribed by an attorney, and directed to the defendant, &c.

Code, § 128.

Attorneys are officers of the Court, and the Code devolves on them the authority to issue process instead of upon a clerk or other officer.

The Revised Statutes of New York, passed in 1828, provided:

"No action for the recovery of any debt, demand or damages only, or for the recovery of any penalty or forfeiture, shall be deemed to have been commenced within the meaning of this chapter, unless it appear:

1. That the first process or proceeding therein was duly served upon the defendants, or some one of them; or,

2. That a *capias ad respondendum* was issued within the time required by law to the sheriff of the county in which the defendants, or one of them, usually resided, or last resided, in good faith, and with intent to be actually served; and that such writ was duly returned."

2 Revised Stat., N. Y., 1st Ed., p. 299, § 38.

The chapter is entitled "Of Actions and the times of commencing them."

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1. That the first process or proceeding therein was duly served upon the defendants, or some one of them; or,

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2 Revised Stat., N. Y., 1st Ed., p. 299, § 38.

The chapter is entitled "Of Actions and the times of commencing them."

II.

If the common law does not apply, then the time of the commencement of this suit is governed by the New York Code of Civil Procedure.

Under this Code the action was commenced Aug. 26th, and, therefore, also in any event within 90 days.

The New York Code of Civil Procedure, as in force at the time this action was commenced, provided as follows:

CHAPTER IV.

General provisions as to the time of commencing actions.

* * * * * * * * *

"§ 99. An action is commenced as to each defendant when the summons is served on him, or on a co defendant, who is a joint contractor, or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided."

The attempt to commence this action was clearly made by delivery of the summons to the sheriff for service within the prescribed ninety days.

III.

The decision of the secretary, within the proper meaning and construction of the statute was ren-

dered May 29th, and the summons having been served on August 27th, the suit in any event was commenced within ninety days.

The Statute, Act of June 30, 1864, chap. 171, 13 Stat. at Large, 215, provides that the importer shall only have a right of action against a collector for duties exacted in excess in case there has been—

1st, a protest by the importer, followed by an appeal from the decision of the Collector to the Secretary of the Treasury.

2d. A decision by the Secretary upon such appeal, unless delayed beyond certain dates.

3d. The commencement of the suit within ninety days after such decision.

The case at bar presents the question, When does the ninety days begin to run?

The proposition of the plaintiffs is, that the ninety days begins to run only after the promulgation of the decision, *i. e.*, in the present case the decision was not made and promulgated so that the time of limitation began to run until May 29th, the date of its receipt by the Collector, on which day the plaintiffs also received notice that they could learn of the decision by calling on the Collector.

Section 14 provides for "Appeal therefrom," *i. e.*, liquidation by Collector, "to the Secretary of the Treasury, whose decision thereon shall be final and conclusive," * * * * "unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury upon such appeal." Further on is the provision: "And no suit shall be maintained, &c., until the decision of the Secretary of the Treasury shall have been *first* HAD on such appeal, unless said decision of the Secretary of the Treasury shall be delayed more than ninety days from the date of such appeal, in case of an entry at any port east of the Rocky Mountains, or more than *five months* in case of an entry west of those mountains."

It is submitted that all these provisions taken together show the manifest intent to have been that

the decision of the secretary should be promulgated as the case finds is the practice, and that it is not made within the meaning of the law until it has "*first been had*," either by the collector or importer, or both.

Hence the provisions for two months more time for *the having* of the decision where the entry was at ports west of the Rocky Mountains.

In conclusion, we submit with confidence, that this Court will not give an unduly strict construction to a statute, in order that there may upon a mere technicality be kept in the treasury money confessedly due to citizens. More especially when every conceivable step has been taken by such citizens to preserve their rights.

STEPHEN G. CLARKE,
Of Counsel for Plaintiffs.

108-16

OFFICE SUPREME COURT U. S.
FILED
MAR 16 1883
JAMES H. McKENNEY, Clerk.

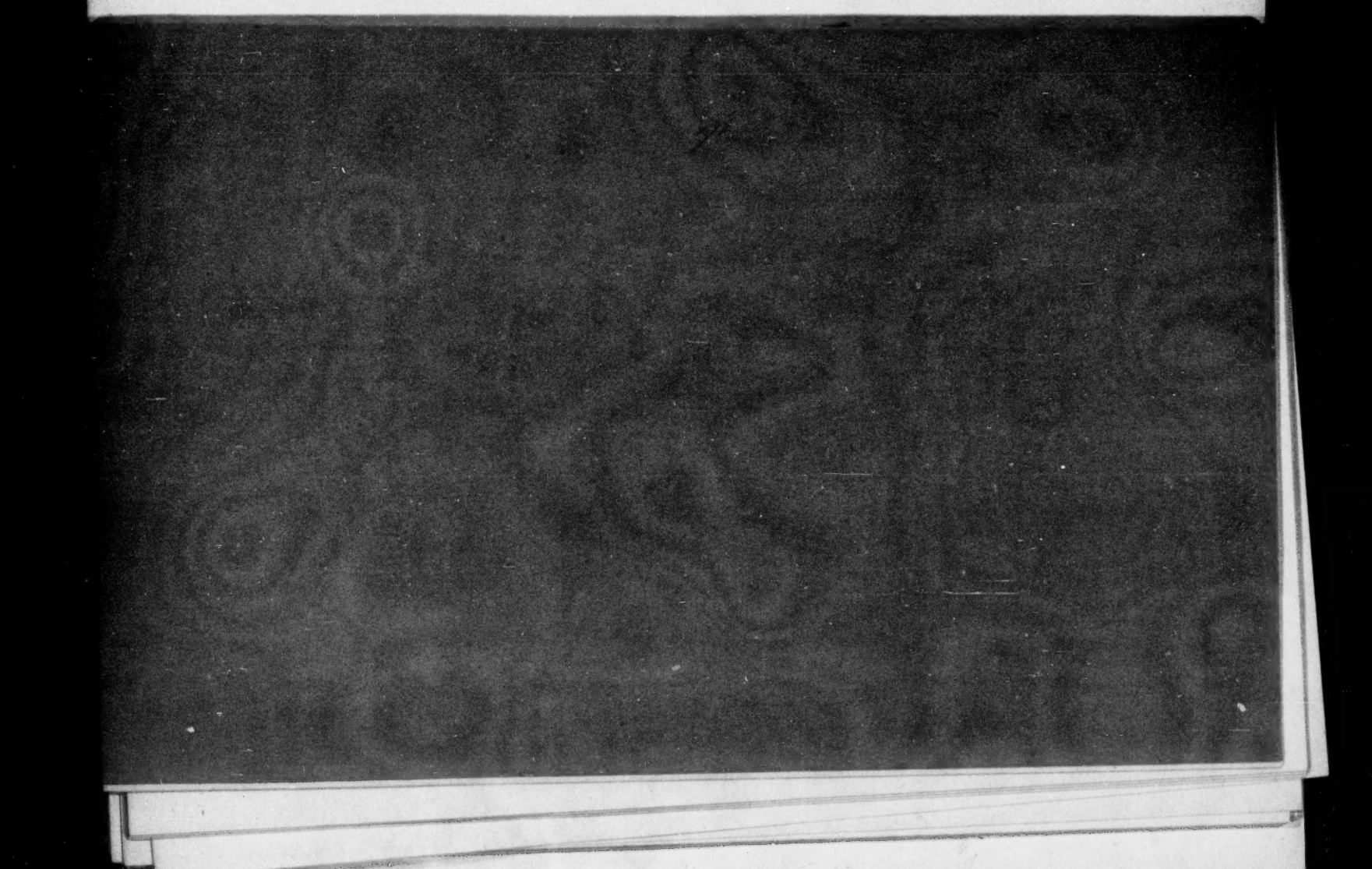
In the Supreme Court of the United States.

OCTOBER TERM, 1882.

LEVI GOLDENBERG ET AL., PLAINTIFFS IN error,
vs.
THOMAS MURPHY, LATE COLLECTOR, &C., &C.
} No. 183.

BRIEF FOR THE UNITED STATES.

10517



In the Supreme Court of the United States.

OCTOBER TERM, 1882.

LEVI GOLDENBERG ET AL., PLAINTIFFS IN error,
vs.
THOMAS MURPHY, LATE COLLECTOR, &C., &C. } No. 183.

BRIEF FOR THE UNITED STATES.

This is an action by Goldenberg Brothers & Co. to recover from the defendant, Thomas Murphy, late collector of the port of New York, certain duties alleged to have been illegally exacted by him from the plaintiffs.

The only question in the case is, whether the action was brought within the limitation prescribed by section 14 of the act of 30th June, 1864. (13 Stats., pp. 214, 215.)

Goldenberg Brothers & Co. made an importation of thread lace, which was entered at the custom-house on the 12th September, 1871, on which a duty of 60 per cent. ad valorem was levied and collected.

The importers duly protested, and appealed to the Secre-

tary of the Treasury, who rendered a decision, affirming the collector's assessment, on the 28th of May, 1872. (R., pp. 6, 7.)

Suit was commenced in the supreme court of the city of New York by the importers to recover from the collector 30 per cent. of the duty levied, on 21st August, 1872. (R., p. 2.)

On 13th November, 1872, the suit was removed to the United States circuit court for the southern district of New York. (R., p. 2.)

On the 24th of October, 1879, the case came on for trial. (R., p. 4.)

The plaintiffs to maintain the issues on their part joined introduced evidence of the importation, and the assessment and payment of duty aforesaid, and their protest against the same. (R., p. 6.)

And thereupon the defendant admitted that the said importation was dutiable at 30 per cent. ad valorem, and not at 60 per cent., under the decision of this court. (96 U. S., p. 112, Arthur *v.* Lahey.)

Evidence was also introduced that plaintiffs duly appealed from the collector's decision on 27th September, 1871, and the decision of the Secretary of the Treasury on said appeal, dated the 28th May, 1872, affirming the collector's action, was also read. (R., p. 6.)

There was also read in evidence the letter of the Treasury Department, of the 28th May, 1872, notifying the plaintiffs of the said decision. (R., p. 7.)

It was argued that the decision of the Secretary and the said notification were not received by the collector

and the plaintiffs, respectively, until the 29th May, 1872. (R., p. 7.)

It also appeared that while it is customary for the Secretary of the Treasury to communicate his decision to the collector from whom the appeal is taken, there is no regulation requiring him to do so. (R., p. 8.)

The plaintiffs then read in evidence the summons dated 21st August, 1872, and the deputy sheriff's certificate of service of the same on the defendant on the 27th August, 1872. (R., p. 8.)

It was admitted that the defendant resided in the city of New York, but that he was absent therefrom a few days prior to the 27th August, 1872. (R., p. 8.)

The plaintiffs also read in evidence, by consent, the affidavit of Isaac Phillips, the attorney who brought this suit. He deposes, *inter alia*, that not being able to find the defendant Murphy between the 21st and 26th August, 1872, he had the summons put in the sheriff's hands for service on 26th August, and was informed by one Thomson on that day that he had left the summons at the sheriff's office; that service was made on the 27th August, and that the defendant appeared to the action and removed the same to the United States circuit court, and that commencement of suit *by service of process* was within ninety days from the 29th May, 1872, the date of the receipt of the decision of the Secretary of the Treasury. (R., p. 9.)

The plaintiffs also read, by consent, the affidavit of Joseph D. Brennan, the clerk of the sheriff, to show that said summons was delivered to the sheriff for service on 26th August, 1872, and served on the 27th of the same month. (R., p. 10.)

It was agreed that ninety days from the 28th May, 1872, expired on 26th August following, and that ninety days from 29th of the same month expired on 27th of August following. Upon this presentation the plaintiffs' counsel asked the court to direct a verdict in their favor, but the court refused to do so, and thereupon the defendant asked the court to direct a verdict in his favor, which was done. To these rulings the plaintiffs excepted. (R., p. 10.)

As the law stood when this case arose, and now stands, the decision of the Secretary on an appeal from the collector is final, "*unless suit shall be brought within ninety days after the decision of the Secretary*," act June 30, 1864, ch. 171, § 14. (13 Stats., p. 215.)

The only question in this case is whether this suit was brought within the said limitation of ninety days.

The first question is as to the *terminus a quo* in reckoning the period of ninety days. The defendant in error contends that the law requires it to be computed from the date of the Secretary's decision, which was the 28th of May, 1872, in this case, and the plaintiffs in error that it should be computed from 29th May, 1872, the day the decision was received in New York.

The law does not require the Secretary to communicate his decision to the importer appealing, or even the collector, and there is nothing in the context of the statute that warrants the view of the plaintiffs in error.

So far from their argument being strengthened by reference to the provision that in appeals from points west of the Rocky Mountains the limitation for bringing suit

shall be *five* months, it is weakened, for the limitation of ninety days could work no inconvenience in such appeals, if, as counsel opposite contend, the computation is to be made from the promulgation of the decision.

If the date of rendering the decision, and not of its promulgation at the place from which the appeal is taken, is the *terminus a quo*, the limitation for bringing suit in this case expired on 26th August, 1872.

The summons bears date 21st August, 1872. It remained in the hands of counsel until 26th August, and counsel, not being able to find defendant, placed it on that day in the hands of the sheriff, who *served it the next day*, the 27th August.

It may be conceded that the suit was *commenced* within the limitation, but the question here is, was it "*brought*" in the sense of the statute.

In some States a suit is commenced by impetrating the writ and placing it in the hands of the sheriff, but in Connecticut and Vermont a suit is not considered as commenced, even for the purpose of taking a case out of the statute of limitations, until it is served on the defendant.

But when the statute says suit shall be "brought" within a given time, is it enough that it should be *commenced* only; in other words, are these terms the equivalents of one another?

Upon an examination of the legislation of Congress on the subject of limitations we find that uniformly the action in each case is required to be "*commenced*" or prosecuted within the time named, except in the act of June 30th, 1864, now in question, the act of June 6th, 1872 (17 Stats.,

257), limiting the time of bringing suits for internal-revenue taxes, and section 5057, R. S., limiting the time for suing assignees of bankrupts. (*Vide* 1 Stats., pp. 125, 177, 696; 2 *ib.*, 374, 811; 3 *ib.*, 453; 4 *ib.*, 392; 5 *ib.*, 322.)

It is significant that the term "*brought*" should be used in these three cases, and the inference is that Congress intended to use it in a sense different from that of commence.

Having regard to the good of the Treasury in the one case, and to the speedy settlement of bankrupts' estates, in the other Congress intended that there should be an actual *lis pendens* before the limitation expired.

Provisions of law touching the revenue are necessarily rigorous, and if a party cannot get justice under the statute, it is always open to him to apply to Congress.

It much concerns the revenue that the collector to be sued be brought into court with as little delay as possible, and if process cannot be executed on him within the ninety days the party is remediless, so far as the courts are concerned, and deservedly so if, as in the case at bar, he put off commencing suit until the limitation was nearly spent.

We submit that it is wise in the courts to interpret the statute as requiring an actual *lis pendens* to be on foot within the period of limitation. Under such an interpretation it must generally be the collector's fault if suits are not speedily terminated while the evidence is at hand.

It is further submitted, that as the laws of the United States must operate uniformly throughout the country,

the New York code of procedure can have no influence on the meaning of the statute involved in this case.

WM. A. MAURY,
Assistant Attorney-General.

O

OFFICE SUPREME COURT U. S.
FILED
FEB 2 1883
H. McKENNEY, Clerk.

108-165

IN THE

Supreme Court of the United States.

B. F. HILTON
vs.
C. D. GILMORE *et al.* } *No.* 6100.

C. D. GILMORE
vs.
B. S. HILTON *et al.* } *No.* 6334.

} *No.* ~~858~~ 531, S. C. U. S.

Now comes the appellant, Benjamin S. Hilton, and by his counsel moves this Honorable Court for an order directing the Clerk of this Court to omit from the record to be printed for the hearing of these causes, as consolidated, the depositions taken in the interpleader suit of No. 6344, on behalf of John Devlin and William H. Dickinson, or for such order as may be proper in the premises.

F. P. B. SANDS,
of Counsel for Appellant.

BRIEF AND ARGUMENT ON ABOVE MOTION.

The grounds upon which the above motion is based may be very briefly stated from the record.

In the suit instituted by Hilton, No. 6100 Equity, he, as a *non-resident*, had been required to deposit a certain sum as security for costs; and when the interpleader suit was brought, he gave notice to Devlin and Dickinson, *also non-residents*, of a motion that they should make a similar deposit.

Thereupon, on the 2d day of January, 1880, a stipulation was entered into between these three several parties, by their counsel of record, in the following words:

"IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

"GILMORE
vs.
DEVLIN *et al.* } *No.* 6344.

"Whereas, defendant Hilton has given due notice of a motion to require defendant Dickinson to give security for costs, to be heard on Saturday next, and whereas, defendant Devlin desires to support said motion, and, with defendant Hilton, to offer to make deposit of $50 each as security for costs, and whereas, defendant Dickinson expresses his willingness to make a similar deposit, it is this 2d day of January, 1880, mutually agreed and stipulated that each of the defendants already named will, on or before Monday, the 12th of January instant, make a deposit of $50 with the Clerk of the Court, as security for costs in this case, and that this stipulation shall have the same force and effect as an order of Court; and it is further agreed that if any of the parties hereto fail to make the said deposit, as agreed, the testimony taken or to be taken on their behalf shall not be admitted as evidence in this case, nor shall the party or parties so failing be qualified to prosecute their rights, if any they have, in this suit without the further order of the Court, obtained after due notice to the other parties.

"MCPHERSON & CARLISLE, *Solicitors for Hilton.*
"MERRICK & MORRIS, *Solicitors for Devlin.*
"FRANK W. HACKETT, *Solicitor for W. H. Dickinson.*
"A true copy. Test: R. J. MEIGS, *Clerk, &c.*
"By R. J. MEIGS, No. 3, *Assistant.*

Hilton (this appellant) promptly made his deposit under that stipulation. Neither of his contestants followed his example.

Dickinson gave the Clerk of the Court a check on some bank in New York, payable to his order, which the Clerk was so credulous as to indorse, and it came back to him

protested, with $1.75 costs, which he had to pay out of his own pocket.

Devlin, however, made no pretense of complying with the stipulation, but, with one other witness, proceeded to give his testimony. Hilton's counsel objected, and declined to cross-examine either of them, very properly basing the objection upon the non-compliance with the stipulation.

Upon this, Devlin went into court, and, on the 31st of January, 1880, obtained an order in the following words, to wit:

"IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

"CHARLES D. GILMORE
vs.
JOHN DEVLIN *et al.* } *No.* 6344. *Equity.*

"It is ordered by the Court this 31st day of January, A. D. 1880, that the defendant, Devlin, have leave to pay into court, *nunc pro tunc*, the deposit of $50, heretofore required as security for costs in this cause; but this shall not be construed to have the effect to allow the testimony of Devlin to be read at the hearing, unless the testimony taken on behalf of the defendant, Dickinson, should be admitted in evidence by further order of the Court; and, further, that the defendant, Devlin, shall be produced for cross-examination, if required, in the event of his testimony being admitted in evidence, as aforesaid.

"CHAS. P. JAMES, *Justice.*

"A true copy. Test: R. J. MEIGS, *Clerk, &c.*
"By R. J. MEIGS, No. 3, *Assistant.*"

No subsequent order was ever passed admitting the testimony of Dickinson. Consequently, under said stipulation and said order of the Court, the testimony on behalf of Devlin and Dickinson in said interpleader suit was expressly out of the case.

In the preparation of the transcript of the record in these consolidated cases, the Clerk of the Supreme Court of the District of Columbia has included all the papers filed in his

office and all the orders of the Court in the cause, as the rules of this Court required him to do.

Since, however, it is manifest, as above shown from the record itself, that the depositions referred to in the motion are not here for consideration by this Honorable Court, this appellant presses this motion with the desire of saving *to the parties* the expense of printing those depositions; *to the counsel* the unnecessary labor of reading and discussing them, and *to the Court* the trouble of considering them.

The propriety of this motion will further appear, your attention being called to the fact that the counsel for Hilton, relying upon the good faith of the parties to the stipulation and to the order of the Court, declined to cross-examine the witnesses and objected to their examination, the terms and conditions of the said stipulation and order not having been complied with by said parties, and he went to a hearing with proper confidence, believing that *ex parte* depositions would not be read in violation of said stipulation.

Being desirous of relieving the case before the Court from this mass of testimony, (which cannot be considered in connection therewith,) this motion is respectfully submitted.

F. P. B. Sands,
Of Counsel for Appellant.

OFFICE SUPREME COURT U.S.
FILED
FEB 3 1883
JAMES H. McKENNEY, Clerk

108-165

Supreme Court of the United States.

No. 531.

BENJAMIN S. HILTON, APPELLANT,

vs.

JOHN DEVLIN AND WILLIAM H. DICKINSON.

JOHN DEVLIN, APPELLANT,

vs.

BENJAMIN S. HILTON AND WILLIAM H. DICKINSON.

Statement on behalf of John Devlin, Appellant and Appellee.

This is a triangular controversy over a fund in the registry of the supreme court of the District of Columbia paid in under a bill of interpleader. The money belonged originally to John Devlin. William H. Dickinson claimed it under an alleged claim of services rendered in recovering it from the United States. Benjamin S. Hilton claimed it as assignee of another individual who sought to show that he was the party that had recovered it. Devlin denied the claims of both. The special term of the supreme court of the District of Columbia decided in favor of Hilton. The general term of that court decided that neither Hilton nor Dickinson had any just or legal claim upon the fund, yet concluded to divide it between them as the best disposition

that could be made of it. Both Hilton and Devlin appealed.

Hilton docketed his appeal, and filed the record. Through inadvertence, or for some other reason, Devlin failed to docket his appeal, and give security for costs to the clerk. But it seems to have been understood between his counsel and Hilton's counsel that the one case and the one record would do for both.

Before the decree rendered by the general term of the supreme court of the District of Columbia, Dickinson had recovered judgment on the same cause of action against Devlin in New York; and Devlin had paid the judgment and taken an assignment or relinquishment from Dickinson of any and all rights which the latter had in these suits in the District of Columbia. In other words, Dickinson had been paid and satisfied before the decree was rendered for him and Hilton jointly in these cases.

Dickinson seems to have kept his settlement a secret from his counsel here. But more than twelve months ago counsel for Devlin advised him of the fact. Notwithstanding this, he persisted in intermeddling in the case, and prosecuting it on his own account. Recently through his counsel, Devlin, as the assignee of Dickinson, notified him to interfere no further in the matter of these appeals, and that his services as attorney in these cases were dispensed with; and thereupon the assignment from Dickinson to Devlin was filed in the clerk's office.

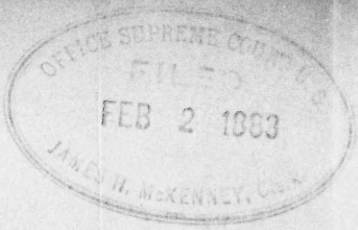
It is submitted that, under these circumstances, the action of Dickinson's counsel is most extraordinary and most unwarrantable. His client has been paid and satisfied; and he has nothing further to do with these cases.

Neither as appellant nor as appellee, neither in his own original right nor as assignee of Dickinson, does John Devlin assent to the motions made. On the contrary, he desires to have the appeals heard on their merits when they are reached for argument; and he protests against the action of Dickinson's counsel as unauthorized.

As to the motion to dismiss Devlin's appeal because of his failure to docket it and secure the clerk, the failure seems to have been caused by inadvertance and the supposition that the docketing of one appeal would do for both. Since his attention has been called to the matter, he has caused his appearance to be entered, and has given security to the clerk, and only awaits the permission of the court to docket his appeal now. As both appeals can and should be heard together, and no injury has been, or can be, done to any one by his failure to docket, and he has now secured the clerk and entered his appearance, it is respectfully submitted that he should be allowed *nunc pro tunc* to docket his appeal, and that the motion to dismiss should be denied.

M. F. Morris,
Of Counsel for John Devlin.

Record.
not printed



108-165

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1882.

BENJAMIN S. HILTON, *Appellant*,

vs.

WILLIAM H. DICKINSON,
C. D. GILMORE.
JOHN DEVLIN, *Appellees*.

Brief of Appellant, upon the motion of Appellee Dickinson to dismiss this appeal.

This is an appeal from a decree of the Supreme Court of the District of Columbia, December 20, 1880.

One Gilmore held in his hands $2500 belonging to said Hilton, assignee of one Sherman, a lawyer, the fee agreed upon as due Sherman for professional services in a successful claim before the Court of Claims in behalf of one Devlin.

When this said Hilton made demand upon Gilmore for his said $2500, payment was delayed; and thereupon he filed his bill in Equity, No. 6100, on February 16, 1878, against Chipman & Hosmer and Gilmore to recover this fund. Pending this suit, and after Gilmore had by answer admitted having the fund in his hands, he was ordered by the Court, in July, 1878, to deposit the same in the registry of the court, and was directed to file a bill of inter-

pleader setting up the facts contained in the answer referred to. This bill was filed, being No. 6344 Equity. The fund was subsequently invested in U. S. four per cent. bonds, to the extent of $2450.

The decree passed on 22d May, 1880, in Special Term, giving the whole fund sought for by complainant below—being in excess of $2500—and costs in both suits against the defendants therein, is correctly set out in brief of appellee; as, also, the decree of December 20th, 1880, from which the appeal was taken.

The criticism upon the language of the appeal and the conclusion of the learned counsel for appellee as to the meaning and limit of the appeal are not, we respectfully submit, a fair interpretation to give to that language, nor are the conclusions arrived at warranted by the facts or by the law.

This appellant is *very far* from being "content with so much of the decree of the General Term as gives him one-half of the fund." This appellant was and could be content *only* with a decree such as that of the Special Term, which gave him the whole fund and *costs against all the defendants in both causes.* But *in so much* as the Court in General Term saw fit to modify that decree to the prejudice of appellant's right thereunder, he exercised his right to appeal to this court for the maintenance of his just claim and title to that fund in its integrity.

He appealed from the whole decree, *except in so far as it affirmed* his *claim* as *against Devlin*, who was again declared *not* to be entitled to that fund[x]—which was sought as an *entire fund* by *each* party, to the utter exclusion of the others, and *no party* admitted or *imagined* that such a thing as a *common interest* in it could be evolved from the evidence submitted to the court.

[x] and from this part of the decree alone is the appeal not taken.

Devlin, also, appealed; and his appeal still stands, and is maintained, as we are informed, and counsel is incorrect in

his statement that "there is no dispute as to appellant's right to one-half the fund, and there is nothing to-day that prevents his proceeding in the court below to avail himself of that portion of the decree of the court."

The pendency of these appeals suspends all claim of title, under the decree below, until the final determination of this court.

The present admission of counsel for appellee that his client does not dispute the appellant's "right to one-half the fund," is scarcely consistent with his pretensions in the court below, where he assumed to say that appellant had no right to *any part* of the fund; and that admission, in advance of the hearing on the merits, would indicate a conviction that his own claim to the fund, as originally made, was not fairly made—or why so eager to take half the loaf?

The appellant's demand before this tribunal is the same as in the court below—the entire fund, with all its accretions, as awarded to him by the decree of May 22, 1880; and he is confident that, upon hearing, the Court also will so award.

I.

As to the jurisdiction in this case, we rely upon the decisions and practice of this court.

The case cited by counsel for appellee, *Terry* vs. *Hatch*, 93 U. S., 44, is not in point at all. The court, after a simple calculation, shows that the amount of Terry's interest at issue did not reach the jurisdictional sum, and the decision made naturally followed.

The rule is well settled in the practice of this court (Phillips' Prac., 2d ed., 77); and in *Knapp* vs. *Banks*, 2 How., 43, its language is precise that the test of jurisdiction is the amount *claimed* by the plaintiff below and *involved* in the judgment or decree appealed from; and "that where

a *less* sum than the whole amount of his demand is allowed," he can appeal to recover the whole amount.

This appellant (Hilton) was plaintiff below, claiming the whole fund in controversy (See *Bank U. S.* vs. *Daniel*, 12 Pet., 32); his appeal is from a decree which does not give him his full rights, and the amount involved being in excess of the jurisdictional sum, the motion to dismiss should be denied.

II.

We submit that the appellee (Dickinson) has no standing in this court. Under the stipulation and order of court in the record (cited on pp. 2 and 3 of appellant's motion to omit certain evidence from the record in printing), Dickinson could not be heard at all.

Furthermore, we find filed by appellant Devlin in this court the following paper—to wit:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

CHARLES D. GILMORE, *Complainant*,
vs.
JOHN DEVLIN *et al.*, *Defendants*. } No. 6344. Equity.

For and in consideration of the sum of One Dollar to me in hand paid, the receipt whereof is hereby acknowledged by the above defendant, John Devlin, I do hereby assign, transfer, and set over unto the said John Devlin all my right, title, and interest of, in and to the claim and money involved in the above action and of every part thereof, and I do hereby authorize and empower the said John Devlin to demand, collect, receive, and receipt for any and all interest in the said claim and moneys, the same as I might or could do if these presents had not been made.

In witness whereof I have hereunto set my hand and seal, this *Second day of July*, in the year one thousand eight hundred and eighty.

(Sig.) WILLIAM H. DICKINSON [SEAL.]

Sealed and delivered
in presence of: CHAS. D. SHIRMER.

The argument before the General Term below was not made until *December, 1880;* and said appellee had *then* no standing in fact in the proceedings, and *certainly* has none here, the whole controversy being between Hilton and Devlin, whose counsel requests me to state that he opposes the motion made by appellee Dickinson, and protests against his interference in this appeal,—which facts are submitted to the court as additional reason for denying the motion of appellee.

F. P. B. SANDS,
for appellant.

Being informed that, since the notice of this motion to dismiss was served, the appeal of Devlin has upon motion of Dickinson, been docketted and dismissed. I respectfully submit that Dickinson, by reason of the assignment above made, is still estopped from pressing this motion to dismiss since Devlin is in fact the appellee, and he opposes the motion as above mentioned

F P B Sands
for appellant.

No. 531

OFFICE SUPREME COURT U.S.
FILED
FEB 2 1883
JAMES H. McKENNEY, Clerk.

108-165

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1882.

BENJ. S. HILTON, *Appellant*,

vs.

WILLIAM H. DICKINSON, *Appellee.*

And now comes William H. Dickinson, appellee, and moves the Court to dismiss the appeal in this case, for the reason that the matter in dispute, exclusive of costs, does not exceed the value of $2,500, and that the Court is without jurisdiction.

By his Attorney—

FRANK W. HACKETT.

Brief.

This is an appeal from a decree, December 20th, 1880, of the Supreme Court of the District of Columbia.

One Gilmore, a co-partner and successor to the firm of Chipman and Hosmer, attorneys at law, held in his hands $2,500, the remainder of $10,000 recovered by one Devlin in the Court of Claims Chipman and Hosmer had paid Devlin $5,000, and retained $2,500 as their fees. This $2,500

was claimed by appellee Dickinson, a lawyer of New York, by appellant Hilton, assignee of one Sherman, also a lawyer and by Devlin himself. Hilton brought a bill in Equity, February 16th, 1878, against Chipman and Hosmer for a personal decree, and against Gilmore to reach this $2,500 in Gilmore's hands. Gilmore, a few months later (July 20, 1878), filed a bill of interpleader making Hilton, Dickinson, Devlin and others defendants. The court ordered the fund to be paid into court, and defendants Hilton, Dickinson and Devlin to interplead. On motion of Dickinson the $2,500 was by order of court, April 19, 1879, invested in four per cent. Government bonds to the extent of $2,450. At the date of the decree from which this appeal is taken, the fund, by adding the interest and the premium on the bonds, had increased in value to—say $3,000.

The following decree was entered upon the hearing in the special term:

BENJAMIN S. HILTON
vs.
GILMORE ET AL. } In Equity, No. 6100.

C. D. GILMORE
vs.
DEVLIN ET AL. } In Equity, No. 6344.

These causes came on to be heard and were argued by counsel, and thereupon, upon consideration thereof, it is this twenty-second day of May, A. D., 1880, ordered, adjudged and decreed that the above entitled causes be, and they are hereby consolidated, and that the fund deposited in the registry of this court, in the interpleader cause No. 6344, and invested by the order of this court be, together with the interest accrued thereon, paid over to Benjamin S. Hilton, defendant in said last mentioned cause; subject, however, to the deduction of one hundred dollars counsel fee, to be paid therefrom to the solicitor who filed the bill of interpleader No. 6344.

And it is further ordered, adjudged and decreed that

the said Benjamin S. Hilton, complainant in cause No. 6100, and defendant in cause No. 6344, do have and recover from the defendants in cause No. 6100, and from his co-defendants in the interpleader cause No. 6344, his reasonable costs to be taxed by the clerk.

Both Dickinson and Devlin appealed from this decree. Upon hearing in the general term, the following decree was entered:

"These causes came on to be heard on the appeals of Dickinson and Devlin from the decree of the special term passed herein on the 22d day of May, 1880, and were argued by counsel, and the proceedings were read and considered; thereupon it is, this 20th day of December, 1880, ordered, adjudged and decreed that the decree of the special term be, and the same is hereby modified as follows—that is to say, that the fund deposited in the registry of this court in the interpleader cause No. 6344, and invested by order of the court be, together with all its accretions, paid over to the defendants, Benjamin S. Hilton and William H. Dickinson, or their solicitors of record, in equal moieties, subject, however, to the deduction of one hundred dollars counsel fee, to be paid therefrom to the solicitor who filed the bill of interpleader No. 6344, and that the said defendants, Benjamin S. Hilton and William H. Dickinson, do have and recover from their co-defendant, John Devlin, their reasonable costs in cause No. 6344, to be taxed by the clerk. And it is further ordered, adjudged and decreed that in other respects the decree of the special term be, and the same is, hereby affirmed. And from this decree the defendant, John Devlin, prays an appeal to the Supreme Court of the United States, which is allowed; and the bond to operate as a supersedeas is fixed at three hundred dollars.

By order of the Court,

"D. K. CARTTER,"
"*Chief Justice.*"

Hilton, not being satisfied with getting one-half only of the fund, had an appeal entered and a citation issued in the following terms:

"The clerk will please enter my appearance for B. S. Hilton, in place of McPherson and Carlisle, in these

causes, and enter an appeal to the Supreme Court of the United States in behalf of said Hilton from decree of court in General Term, rendered on 20th of December, 1880, in so far as it modifies the decree of the court below, and issue citation pursuant to law to defendant Dickinson.

"F. P. B. SANDS,
"*Solicitor for Hilton.*"

The allowance of the appeal is based, it is presumed, upon the fact that the Chief Justice signed the citation December 30, 1880. The language of the citation recites an appeal taken from the decree of the general term, "*so far as said decree modifies the decree of the court below*, to wit, the special term in Equity."

The appellant is content with so much of the decree of the general term as gives him one-half of the fund. He appealed only from a part of the decree. There is no dispute as to his right to one-half the fund; and there is nothing to-day that prevents his proceeding in the court below to avail himself of that portion of the decree of the court.

The appeal taken by Devlin has been docketed and dismissed. The only "matter in dispute," therefore, in this court is that half of the fund which the court below has ordered to be paid to the appellee, Dickinson. This does not exceed $1500.

I.

A party, by appealing from part of a decree, admits the remainder to be correct.

2 Dan. Ch. Pr. (5th Ed.), * 1467;
Kelsey vs. *Weston*, 2 N. Y., 505;
Norbury vs. *Meade*, 3 Bligh., 261.

"I think it is a rule of practice from which we ought not to depart; that when the petition of appeal recites specifically the parts of the decree of which it complains, and from which the appeal is made, the appellant is to be confined to those parts of the decree." KENT, C. J. *Sands* vs. *Codwise*, 4 Johns, 602.

II.

The court will ascertain just what amount is involved between appellant and appellee, *Terry* vs. *Hatch*, 97 U. S. 44. Several decrees had been passed; a master's report allowed Terry's claim of $23,000, also Hatch's of $88,-00. This was a suit by creditors against an insolvent bank. Terry excepted to the master's report allowing the above sums; and the court overruling his exceptions, he appealed without joining any other party to the record with him as appellant. 3

In the the case at bar, value of the matter in dispute plainly appears from the pleadings to be less than the jurisdictional amount. This is a fact easily ascertained, and no review of the merits of the case can alter it. The appeal ought to be dismissed without compelling the appellee to go to a final hearing.

FRANK W. HACKETT,
For Appellee.